

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
ERIC HILL,  
Defendant.

Case No. 3:20-cr-00329-JD-1

## **ORDER RE MOTION TO SUPPRESS**

Defendant Eric Hill asks to suppress evidence obtained from his cell phone and a Google email account pursuant to federal search warrants. Dkt. No. 92. The Court previously denied a motion to suppress a different search by Hill's co-defendant, Jazz Svarda. Dkt. No. 87.

Suppression is denied for the cell phone search. Because there is no “substantial preliminary showing” of material omissions or false statements in the application for the cell phone warrant, Hill’s request for a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), is also denied. See *United States v. Rodriguez-Castorena*, No. 15-cr-345-JD, 2017 WL 513023, at \*2 (N.D. Cal. Feb. 8, 2017). Suppression is granted for the Google account search.

## BACKGROUND

The salient facts are not disputed. On November 21, 2018, two armed men wearing masks and hoods absconded with over 1,000 prescription pills, including oxycodone and hydrocodone, from a Walgreens pharmacy in San Francisco. Dkt. No. 93-1 ¶ 22-23 (cell phone warrant affidavit). On December 6, 2018, and December 18, 2018, defendants Svarda and Hill, respectively, were arrested and charged for the incident based on a video recording that allowed San Francisco Police Department officers to identify them by their clothing and the cars used to leave the scene. *Id.* ¶ 22. When Hill was arrested, SFPD officers found a firearm, and a jacket

1 and shoes matching those worn by one of the men during the incident. *Id.* ¶ 24. Hill also had a  
2 cell phone in his possession. *Id.*

3 Prior to Hill's arrest, SFPD investigators had obtained a search warrant for cell-site  
4 location and related information, which showed that Hill's cell phone was in the area of the  
5 Walgreens at the time of the incident. *Id.* SFPD officers seized Hill's cell phone, and on January  
6 2, 2019, obtained a California state warrant to access its contents. Dkt. No. 93-3.

7 After searching the cell phone pursuant to the warrant, the SFPD investigators sought and  
8 obtained a state search warrant for the hill\_\_\_\_@gmail.com Google account on February 8, 2019.  
9 Dkt. No. 93-4. The state warrant was based on the search of the cell phone, which had disclosed  
10 the email address hill\_\_\_\_@gmail.com.<sup>1</sup> *Id.* at 5.

11 The evidence from the cell phone is said to show that Hill called Svarda on the morning of  
12 the robbery, and that Hill and Svarda exchanged text messages on the morning of the robbery, and  
13 texts about selling drugs, including the types of pills stolen from the Walgreens. Dkt. No. 96 at 2.  
14 The contents of the Google accounts are said to show that Hill was in the area of the Walgreens at  
15 the time of the robbery and that his path after the robbery was the same as the path of a car leaving  
16 the scene. *Id.*

17 This is not Hill's first motion to suppress. Hill originally asked to suppress the state cell  
18 phone and Google warrants, and all evidence obtained in connection with them. *See* Dkt. No. 46.  
19 The main objections were that the warrants were overbroad and lacked sufficient particularity. *Id.*  
20 at 5-7 (phone warrant); *id.* at 7-9 (Google warrant). The Court held a non-evidentiary hearing on  
21 the suppression request, and expressed the tentative view that the affidavits for the state warrants  
22 were thin, particularly with respect to Google. *See* Dkt. No. 58. The Court did not issue a final  
23 decision on the matter because federal investigators from the Drug Enforcement Administration  
24 sought a federal warrant for the phone, which was granted by a magistrate judge on May 7, 2021.  
25 Dkt. No. 93-1. The Court concluded that this mooted the prior suppression motion. *See* Dkt. No.  
26 72.  
27

28 <sup>1</sup> The full email address for all accounts is redacted in the interest of privacy.

1 In June 2021, DEA agents subpoenaed Google for information about accounts associated  
2 with Hill's cell phone number. Dkt. No. 93-14. Google's response identified jimj\_\_\_\_@gmail.com  
3 as an account associated with Hill's phone number. Dkt. No. 93-16. Google also produced  
4 subscriber information for that account, which identified hill\_\_\_\_@gmail.com as the recovery  
5 email for the jimj\_\_\_\_@gmail.com account. Dkt. No. 93-15. The DEA agents subsequently  
6 sought a federal warrant for the hill\_\_\_\_@gmail.com Google account, which was issued on  
7 September 29, 2021. Dkt. No. 93-2.

In the present motion, Hill says that the second round of federal warrants was irredeemably tainted by information unlawfully acquired from the state warrants. In effect, Hill says that once the investigators saw the contents of the cell phone and the Google information, the federal applications were necessarily the fruits of a poisonous tree. Hill also says that the government did not seek the federal warrants until approximately two years after the seizure of the cell phone, which he believes invalidates the warrants, and renews a prior objection that the scope of the Google warrant was overbroad. *See* Dkt No. 92 at 15-19. He requested a hearing under *Franks v. Delaware* on the contention that both federal warrant applications contained materially false statements or omitted material information. *Id.* at 20-23.

## DISCUSSION

## I. THE FEDERAL CELL PHONE WARRANT

19 Hill’s main challenge to the cell phone warrant is based on the well-established principle  
20 that “the exclusionary rule encompasses both the ‘primary evidence obtained as a direct result of  
21 an illegal search or seizure’ and, relevant here, ‘evidence later discovered and found to be  
22 derivative of an illegality,’ the so-called ‘fruit of the poisonous tree.’” *Utah v. Strieff*, 579 U.S.  
23 232, 237 (2016) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)). The Court did not  
24 formally conclude that the state warrant was invalid, and so the predicate element of illegality is  
25 not in evidence. For present purposes, the Court assumes without deciding that the state cell  
26 phone warrant was invalid. It is undisputed, as Hill notes, that the government affiant for the  
27 federal cell phone warrant acknowledged that he had “reviewed a copy of the contents” of Hill’s  
28 cell phone pursuant to the state warrant. Dkt. No. 93-1 ¶ 3.

1           A finding of suppression does not follow ineluctably in these circumstances, as Hill urges.  
2       The question is not simply whether a prior Fourth Amendment violation may have occurred.  
3       Rather, the question is “whether, granting establishment of the primary illegality, the evidence to  
4       which instant objection is made has been come at by exploitation of that illegality or instead by  
5       means sufficiently distinguishable to be purged of the primary taint.” *Wong Sun v. United States*,  
6       371 U.S. 471, 488 (1963) (quotation omitted). Evidence obtained independently of the alleged  
7       constitutional violation is admissible. *See Murray v. United States*, 487 U.S. 533, 537-38 (1988);  
8       *United States v. Heckenkamp*, 482 F.3d 1142, 1149 (9th Cir. 2007). “The focus,” as our circuit  
9       has observed, “is on the causal connection between the illegality and the evidence.” *United States*  
10      *v. Gorman*, 859 F.3d 706, 716 (9th Cir. 2017) (quotation omitted).

11           Hill has not established such a connection here. As the affidavit in support of the federal  
12       warrant application makes clear, all of the salient facts were in the possession of the government  
13       before the state warrant was obtained and Hill’s phone was examined. The affidavit described the  
14       affiant’s experience as a federal agent with cellular devices in drug trafficking investigations, and  
15       the type of information and evidence that can be found on drug trafficker’s cellular devices. Dkt.  
16       No. 93-1 ¶¶ 19-21. It stated that Hill was identified as a suspect by clothing and cars captured on  
17       a surveillance camera, including video footage which showed Hill driving a Ford Focus before  
18       being picked up in an Acura. *Id.* ¶¶ 26, 28-29, 36. The footage showed a license plate number for  
19       the Ford Focus, which SFPD officers used to identify Hill from previous traffic stops. *Id.* ¶¶ 36-  
20       40. Officers found a telephone number in the records from those stops. *Id.* ¶ 39. They called the  
21       number, which was still active, and accessed a voicemail message suggesting that the number  
22       belonged to Hill. *Id.* Law enforcement obtained a search warrant for call detail records and cell-  
23       site location information for Hill’s device and confirmed that Hill’s phone was in the area of the  
24       Walgreens at the time of the robbery. *Id.* ¶ 40.

25           None of these facts was derived from the contents of Hill’s cell phone. All of them were in  
26       existence and known to the government before the phone was seized and searched. Hill has not  
27       shown otherwise, or demonstrated that any specific statement in the affidavit was obtained from  
28       the contents of his phone. In addition, the affiant expressly stated that he had not relied on any

1 information obtained from the prior phone search, and that it was his practice to seek a federal  
2 search warrant when evidence might exist on a cell phone or Google account irrespective of  
3 whether a prior state warrant had been issued. Dkt. No. 96-1 ¶¶ 4-5. Hill did not meaningfully  
4 challenge either statement. Consequently, it cannot be said that the prior illegal conduct Hill  
5 alleges significantly directed the investigation to the evidence in question. *See Gorman*, 859 F.3d  
6 at 716.

7 Hill's case citations do not point to a different conclusion. He relies heavily on *Gorman*  
8 and *United States v. Johns*, 891 F.2d 243 (9th Cir. 1989), but the circumstances in those cases  
9 could not be more different from the facts here. In *Johns*, officers obtained the identity of a driver  
10 and passenger during an illegal stop and search of a vehicle, and then used that identification to  
11 effect a seizure of marijuana. *Johns*, 891 F.2d at 244-45. In *Gorman*, an officer unlawfully  
12 prolonged a traffic stop and used suspicions developed during the detention to advise a separate  
13 law enforcement agency to conduct a second detention with a drug-sniffing dog. *Gorman*, 859  
14 F.3d at 717. In each case, "the impetus for the chain of events" leading to the second search and  
15 seizure was clearly derived from the initial illegal action. *Id.* (quoting *Johns*, 891 F.2d at 245).  
16 The same is not the true for the federal cell phone warrant here.

17 **II. THE TWO-YEAR DELAY**

18 Hill's objection to the length of time before the federal warrant was sought is equally  
19 unavailing. Hill says that the government had his cell phone in its custody for approximately 27  
20 months before the federal warrant was obtained. Dkt. No. 92 at 16.

21 An "unreasonable delay between the seizure of a package and obtaining a search warrant  
22 may violate the defendant's Fourth Amendment rights." *United States v. Sullivan*, 797 F.3d 623,  
23 633 (9th Cir. 2015). Determination of whether a delay was reasonable is based on "the totality of  
24 the circumstances," on a "case-by-case basis," and entails a balance of "the nature and quality of  
25 the intrusion on the individual's Fourth Amendment interests against the importance of the  
26 governmental interests alleged to justify the intrusion." *Id.* (quoting *United States v. Place*, 462  
27 U.S. 696, 703 (1983)).

1       In other circumstances, the Court would likely have little trouble concluding that the  
2 passage of over two years between the seizure of a phone and an application for a warrant would  
3 raise serious concerns. But there is a good exculpatory explanation here. Hill was arrested by the  
4 San Francisco Police Department on December 18, 2018. The state search warrant for Hill's  
5 phone was issued on January 2, 2019. Dkt. No. 93-3. Hill's phone was the subject of a search  
6 warrant within approximately two weeks of his arrest, which is reasonable by any measure.

7       The investigating agencies and officers were entitled to regard the state search warrant as  
8 valid. *See United States v. Leon*, 468 U.S. 897, 918 (1984). Consequently, there was no need for  
9 a federal warrant. This situation did not change until suppression proceedings were underway  
10 before the Court. The record indicates that the application for the federal cell phone warrant was  
11 submitted within approximately three weeks of the April 14, 2021, hearing at which the Court  
12 expressed concerns about the state warrants. *See* Dkt. No. 58; Dkt. No. 93-1. That is hardly an  
13 undue delay. Hill has not demonstrated otherwise, or shown prejudice from this sequence of  
14 events.

15       **III. THE FEDERAL GOOGLE WARRANT**

16       Hill raises a poisonous tree objection to the Google warrant. The Court will not take that  
17 up because the Google warrant was not supported by probable cause, and was little more than a  
18 fishing trip at the expense of Hill's privacy rights.

19       The determination of whether there was probable cause for a search warrant is based on the  
20 totality of the circumstances and a fair probability that contraband or evidence will be found in a  
21 particular place. *United States v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (citing *Illinois v.*  
22 *Gates*, 462 U.S. 213, 246 (1983)). The Court's task is to "make a practical, common-sense  
23 decision," *United States v. Seybold*, 726 F.2d 502, 504 (9th Cir. 1984), on the evidence "contained  
24 within the four corners of a written affidavit given under oath," *United States v. Anderson*, 453  
25 F.2d 174, 175 (9th Cir. 1971). Conclusory statements by the affiant are not facts the Court can  
26 meaningfully evaluate or rely upon. *United States v. Underwood*, 725 F.3d 1076, 1082-83 (9th  
27 Cir. 2013).

1       The application for the federal Google warrant was based in large measure on responses  
2 Google made to a subpoena about the hill\_\_\_\_@gmail.com account, and the jimj\_\_\_\_@gmail.com  
3 account. Dkt. No. 93-2 ¶ 4. Google produced data indicating that the hill\_\_\_\_@gmail.com  
4 account was a recovery account for jimj\_\_\_\_@gmail.com, which was associated with Hill's cell  
5 phone number. *Id.* Payment information associated with the jimj\_\_\_\_@gmail.com account  
6 showed that the account belonged to Hill. *Id.* The agent affiant stated that he had seen evidence  
7 obtained by the state Google warrant, but was not relying on it for the federal warrant. *Id.* ¶ 6.  
8 The affiant also stated that he was not relying on evidence from the federal or state phone  
9 searches. *Id.* ¶ 7.

10       What is missing from the affidavit are any facts establishing probable cause for accessing  
11 Hill's Google accounts. The affiant recounted the basic events of the Walgreens incident, *id.*  
12 ¶¶ 54-74, and said that, in his experience, Google accounts "may" be used for drug trafficking and  
13 other criminal offenses, *id.* ¶¶ 45-53. That is essentially all the affidavit contained in the way of  
14 facts, from which the affiant concluded that the accounts "may" contain relevant evidence. This is  
15 pure supposition, and not a showing of a fair probability that the Google accounts were connected  
16 in any way to the incident, or would lead to something useful as evidence. As the affiant's  
17 speculation implicitly acknowledges, it is equally probable that the accounts contained content that  
18 the government had no right to see. The mere association of Hill's cell phone with the accounts is  
19 not in itself probable cause for the government to peruse them for incriminating evidence.

20       There is also a serious concern that the warrant was overbroad and improperly allowed the  
21 government to do a "general, exploratory rummaging" through Hill's Google accounts. *See In re*  
22 *Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857 (9th Cir. 1991). This concern is  
23 particularly acute for email and other online information. "Searches of electronic records pose  
24 unique challenges for "striking the right balance between the government's interest in law  
25 enforcement and the right of individuals to be free from unreasonable searches and seizures."  
26 *United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013) (quoting *United States v.*  
27 *Comprehensive Drug Testing, Inc. (CDT III)*, 621 F.3d 1162, 1177 (9th Cir. 2010)). "Because  
28 electronic devices could contain vast quantities of intermingled information, raising the risks

1 inherent in over-seizing data, law enforcement and judicial officers must be especially cognizant  
2 of privacy risks when drafting and executing search warrants for electronic evidence.” *Id.* (citing  
3 *CDT III*, 621 F.3d at 1177).

4 The affidavit for the federal Google warrant manifests this danger. It requests all manner  
5 of information about Hill’s Google accounts, including email communications, contacts,  
6 calendars, messaging services, photos, location information, payment records, and more. Dkt. No.  
7 93-2 Atch. B. These sweeping requests are untethered to the Walgreen’s incident, and represent  
8 an unwarranted intrusion into Hill’s privacy rights.

9 Overall, the Google warrant was improvidently issued, and vastly overbroad. All evidence  
10 obtained by the government in connection with the warrant is suppressed. *See United States v.*  
11 *Cardwell*, 620 F.2d 75, 78 (9th Cir. 1982).

#### 12 **IV. AN EVIDENTIARY HEARING IS NOT WARRANTED**

13 Hill requests a hearing under *Franks*, on the grounds that the government made false  
14 statements or omissions in its affidavits supporting the two federal warrants. Dkt. No. 92 at 19-23.  
15 Because the Google evidence is suppressed, the Court considers only whether a *Franks* hearing is  
16 warranted for the federal phone warrant.

17 To merit a hearing, Hill had to establish by a preponderance of the evidence that (1) “the  
18 affiant officer intentionally or recklessly made false or misleading statements or omissions in  
19 support of the warrant,” and (2) “the false or misleading statement or omission was material, i.e.,  
20 necessary to finding probable cause.” *United States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir.  
21 2017) (internal quotations omitted).

22 Hill did not meet these elements. He makes the rather odd comment that the affidavit was  
23 materially misleading because they sought evidence that the federal agent knew was not on the  
24 phone from the prior search under the state warrant. Dkt. No. 92 at 20, 23. In effect, Hill faults  
25 the government for not relying on what he characterized as an illegal prior search, which is  
26 entirely inconsistent with his contention that the federal warrant was illegal because it did rely on  
27 that search. This is not an issue that requires a *Franks* hearing.

1 It also bears emphasis that the salient facts in the affidavit for the federal cell phone  
2 warrant are undisputed statements about the Walgreen's incident and the investigatory follow-up.  
3 None of these statements is subject to genuine dispute, and none raise a credibility issue, such that  
4 a hearing might be warranted.

5 Hill says that the affidavit omitted information about a search of Svarda's phone, which  
6 did not yield any communications with Hill's phone number or email. Dkt. No. 92 at 21-22. But  
7 the record indicates that investigators were unable to unlock the phone. Dkt. No. 93-7 at ECF 7.  
8 In addition, the possibility that Svarda's SIM card did not show communications with Hill would  
9 not, in itself, rule out that Hill's phone and SIM card might. Consequently, the alleged omission  
10 would not have been materially misleading to a magistrate judge reviewing the affidavit.

11 **IT IS SO ORDERED.**

12 Dated: July 8, 2022



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15 JAMES DONATO  
16 United States District Judge  
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